1	IN THE SUPREME COURT OF TH	E UNITED STATES				
2		x				
3	FREE ENTERPRISE FUND AND	:				
4	BECKSTEAD AND WATTS, LLP,	:				
5	Petitioners	:				
6	v.	: No. 08-861				
7	PUBLIC COMPANY	:				
8	ACCOUNTING OVERSIGHT	:				
9	BOARD.	:				
LO		x				
11	Washington, D.C.					
12	Monday, December 7, 2009					
13						
14	The above-entit	led matter came on for oral				
15	argument before the Supreme Court of the United States					
16	at 10:03 a.m.					
L7	APPEARANCES:					
18	MICHAEL A. CARVIN, ESQ., Wash:	ington, D.C.; on behalf of				
19	the Petitioners.					
20	GEN. ELENA KAGAN, ESQ., Solic	itor General, Department of				
21	Justice, Washington, D.C.;	on behalf of the				
22	Respondent United States.					
23	JEFFREY A. LAMKEN, ESQ., Wash:	ington, D.C.; on behalf of				
24	the Respondents Public Comp	pany Accounting Board, et				
25	al.					

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1	PROCEEDINGS
2	(10:03 a.m.)
3	CHIEF JUSTICE ROBERTS: We will hear
4	argument first this morning in Case 08-861, Free
5	Enterprise Fund and Beckstead and Watts v. The Public
6	Company Accounting Oversight Board.
7	Mr. Carvin.
8	ORAL ARGUMENT OF MICHAEL A. CARVIN
9	ON BEHALF OF THE PETITIONERS
10	MR. CARVIN: Mr. Chief Justice, and may it
11	please the Court:
12	The board is unique among Federal regulatory
13	agencies in that the President can neither appoint nor
14	remove its members, nor does he have any ability to
15	designate the chairman or review the work product, so he
16	is stripped of the traditional means of control that he
17	has over the traditional independent agencies.
18	On the other side of the balancing test,
19	Congress provided no reason for stripping him of these
20	traditional means of control.
21	JUSTICE GINSBURG: Why do you call it an
22	independent regulatory agency? I mean, Congress wanted
23	it to be independent of the profession. That much is
24	clear. It didn't want it to be independent of the SEC,
25	so why are you characterizing it as an independent

- 1 regulatory agency?
- 2 MR. CARVIN: Justice Ginsburg, by making it
- 3 public, it made it free of the accounting profession.
- 4 So then the next question is: Why didn't they have the
- 5 same relationship between this agency and the President
- 6 that the FCC and SEC had?
- 7 And, in those instances, the President can
- 8 appoint and remove the members. Now, why didn't they do
- 9 that here?
- 10 JUSTICE GINSBURG: But the -- the SEC
- 11 doesn't have another overseer. I mean, the SEC is set
- 12 up like the FCC, the other independent regulatory
- 13 commissions, but this is a board that has a relationship
- 14 with the SEC, where it can't do anything that doesn't
- 15 have the SEC's approval.
- 16 MR. CARVIN: There is a buffer between the
- 17 President and the board, and that's called the SEC, and
- 18 the board can do many things without the approval of the
- 19 SEC. Most notably, it can conduct inspections and
- 20 investigations. There is no statutory --
- 21 JUSTICE GINSBURG: It can't even issue a
- 22 subpoena without the SEC's approval.
- MR. CARVIN: It actually can collect
- 24 information from anyone associated with the people they
- 25 regulate, the auditing committees. If it seeks to get a

- 1 subpoena from someone outside, if it seeks information
- 2 from someone outside --
- JUSTICE GINSBURG: So the SEC really could
- 4 stop anything?
- 5 MR. CARVIN: It cannot, for example, stop
- 6 what happened to the Petitioners here. There is no
- 7 mechanism in the statute, in any way, shape, or form,
- 8 for the SEC to stop an inspection or investigation as it
- 9 is ongoing.
- 10 JUSTICE GINSBURG: What happened to the
- 11 Petitioners here? I think, if you were challenging what
- 12 happened to the Petitioners here, certainly it would be
- 13 a question of how you would have to do that. You
- 14 ordinarily go through the internal proceedings. But
- 15 here you are bringing a facial challenge and you say,
- 16 never mind any particular proceedings; the whole thing
- 17 is no good.
- 18 MR. CARVIN: No, no, and I'm dealing with
- 19 the inspections issue at large, not for -- for
- 20 Petitioner or for anyone else, there is no mechanism, no
- 21 existing mechanism for the SEC, in any way, to say stop
- 22 the investigation. Equally important --
- JUSTICE SCALIA: When you say "no existing
- 24 mechanism," could the SEC adopt a rule that would give
- 25 the SEC authority to -- to stop it?

- 1 MR. CARVIN: No, it couldn't. But I think
- 2 the main point is, Your Honor, it hasn't, and since it
- 3 hasn't, it doesn't have that authority now.
- 4 JUSTICE SCALIA: Well, never mind --
- 5 MR. CARVIN: But I can tell you --
- 6 JUSTICE SCALIA: I'm not sure that's the
- 7 main point. I think the main -- the main point is
- 8 whether the FCC could stop it -- the SEC could stop it
- 9 if it wanted to.
- 10 MR. CARVIN: Yes, and right now it cannot,
- 11 and that's because --
- 12 JUSTICE SCALIA: Never mind "Right now, it
- 13 cannot." If it issued a rule that said you need our
- 14 approval --
- MR. CARVIN: Yes, it cannot issue such a
- 16 rule.
- 17 JUSTICE SCALIA: It cannot issue such a
- 18 rule?
- MR. CARVIN: Absolutely not.
- JUSTICE SCALIA: Why not?
- 21 MR. CARVIN: Well, the provision they point
- 22 to, 7217(b)(1), says it can relieve the board of
- 23 responsibility, but there is nothing in the statute that
- 24 gives the SEC to conduct the board's statutory duties.
- 25 For example, it couldn't say, we will now

- 1 collect the fees that are going to the board, we will
- 2 now conduct the registration that is going to the board.
- JUSTICE SCALIA: Well, why -- why isn't this
- 4 simply relieving the board of responsibility, saying,
- 5 you no longer have responsibility for -- for
- 6 investigation and inspection in these areas?
- 7 MR. CARVIN: But that --
- 8 JUSTICE SCALIA: They could do that,
- 9 couldn't they?
- 10 MR. CARVIN: No, it can't. But even if it
- 11 could, my major point is that it --
- 12 JUSTICE SCALIA: Well, let's talk about
- 13 whether it can't or not. Why can't it?
- MR. CARVIN: All right. If you turn to 39
- 15 and 40a of the board's appendix, at the back of the red
- 16 brief, the board's brief, it walks you through the
- 17 statutes we have been talking about.
- And at the bottom of 39a, that's 7217(d)(1),
- 19 and that is where it says it can relieve the board of
- 20 responsibilities. And I have two points on that.
- 21 One is there is nothing in here that gives
- 22 the SEC the power to assume the responsibility. It
- 23 simply says the board need not comply with that
- 24 obligation.
- 25 My second point is: This doesn't stop the

- 1 board from doing something. If I relieve my associate
- 2 of the responsibility to give me a brief tomorrow, I
- 3 haven't told him he can't do it. If I want to impose a
- 4 limitation on him, if I want to say stop, I have to
- 5 enclose a limitation. And if you will turn to the very
- 6 next page --
- 7 JUSTICE SCALIA: Don't -- don't you think
- 8 that's what it means, though, realistically?
- 9 MR. CARVIN: You know, Your Honor, I think
- 10 that would be --
- 11 JUSTICE SCALIA: When you no longer have
- 12 responsibility to perform a government -- governmental
- 13 act, you no longer have authority to perform it.
- MR. CARVIN: If you viewed it in isolation,
- 15 that would be an arguable principle. But if you turn to
- 16 the next page, 40a, you see a very specific provision in
- 17 the statute that talks about how they can impose
- 18 limitations on the board.
- 19 And this is when they want to censure --
- 20 impose limitations upon the activities, functions, and
- 21 operations of the board. And what do they need to do?
- 22 They have to have a hearing that the board is violated
- 23 or is unable to comply with any provision of this act or
- 24 without reasonable justification or excuse.
- 25 So Congress has established very serious

- 1 barriers to the SEC even limiting the board's
- 2 responsibilities.
- JUSTICE BREYER: Well, they don't have to --
- 4 they can't issue a subpoena without the board's
- 5 approval, I take it -- the commission's approval.
- 6 MR. CARVIN: They have very serious
- 7 information-gathering powers totally distinct from the
- 8 board.
- 9 JUSTICE BREYER: What?
- 10 MR. CARVIN: Any -- any person who is a
- 11 registered association or anyone who is associated with
- 12 them has to provide documents, witness testimony, wholly
- 13 apart from a subpoena, so anyone who is within the
- 14 regulatory --
- JUSTICE BREYER: Or what?
- 16 MR. CARVIN: Or they will suffer the
- 17 sanctions that are listed in the statute.
- 18 JUSTICE BREYER: And the commission can't
- 19 change the sanctions?
- MR. CARVIN: Well, not -- obviously the
- 21 commission can review the sanctions. But the --
- 22 JUSTICE BREYER: And it can't -- it can't
- 23 pass a rule saying, we don't want you to do that?
- 24 MR. CARVIN: Well, sanctions of course are
- 25 done with order. They get to review the sanctions s

- 1 after the board has done it. I'm talk about the
- 2 prosecutorial, investigative techniques.
- JUSTICE BREYER: So as far as, if the
- 4 company was ever certain it was right and that the
- 5 Accounting Board was out of control, completely wrong,
- 6 the company would just say: I'm not complying; well,
- 7 fine; do what you want. And then at that moment, the
- 8 group that would decide whether they were right or the
- 9 board was right would be the commission; is that right?
- 10 MR. CARVIN: Well, I don't think there ever
- 11 would be a dispute about whether or not they would have
- 12 access to their documents and their testimony, because
- 13 it's written right in the statute.
- 14 JUSTICE BREYER: It says you can get it even
- 15 without a subpoena?
- MR. CARVIN: Yes, absolutely.
- 17 JUSTICE BREYER: Where does it say that? Or
- 18 I'll take your word for it. I will look it up.
- JUSTICE KENNEDY: What happens --
- JUSTICE BREYER: I don't want to delay you,
- 21 so forget it. I will look it up later.
- JUSTICE KENNEDY: What happens to the
- 23 information THAT the board obtains? Can the board go
- 24 public with that or is it all confidential.
- 25 MR. CARVIN: I think -- I think there are

- 1 certain confidentiality restrictions as part of their
- 2 investigative and inspection thing. It's the normal
- 3 kind of inspection, where you go through the
- 4 investigation and they would review the various
- 5 documents.
- And my -- but my basic point is that that is
- 7 a very serious burden on American citizens. That is
- 8 something that is totally outside the SEC's control.
- 9 JUSTICE KENNEDY: The burden of time of
- 10 compliance? I'm sorry? The burden is because it's
- 11 difficult and expensive to comply?
- 12 MR. CARVIN: That would be one. Number two
- 13 and I think probably more important, since the SEC
- 14 doesn't review it, this board was created to make sure
- 15 that there was no more Enrons. So let's look at it from
- 16 the other perspective. Let's say the board was
- 17 negligent or sloppy in ferreting out the kind of
- 18 auditing standards and abuses that the statute was
- 19 enacted to do. The SEC would have no way of knowing
- 20 that, no way of --
- 21 JUSTICE KENNEDY: No, no. But I'm talking
- 22 about the harm to your client and to those similarly
- 23 situated.
- MR. CARVIN: Yes.
- 25 JUSTICE KENNEDY: There is the cost of

- 1 compliance. What other harms or dangers or risks are
- 2 inherent in the power of the board unmonitored,
- 3 unchecked by the SEC, to investigate?
- 4 MR. CARVIN: You are right, Your Honor. The
- 5 burden here is the burden that Mr. Olson suffered in
- 6 Morrison v. Olson. He was never indicted. There was
- 7 never any sanctions subject to review. But he was
- 8 subject to a burdensome investigation and that is the
- 9 burden that affects American citizens that is beyond the
- 10 review of the SEC.
- 11 JUSTICE BREYER: But I've got one thing on
- 12 my list. I'm looking to what they control, can't
- 13 control, the commission. And so far I've written that
- in your view the commission can investigate people
- 15 without subpoenas and the commission can do nothing
- 16 about it, okay? That's one.
- MR. CARVIN: Yes.
- JUSTICE BREYER: Now, what's two?
- 19 MR. CARVIN: Well, I think that is the
- 20 main point.
- 21 JUSTICE BREYER: Okay. So we only have one
- 22 on our list.
- MR. CARVIN: Well --
- JUSTICE BREYER: Okay.
- 25 MR. CARVIN: But I do want to emphasize --

- 1 JUSTICE BREYER: I'm not saying it's good or
- 2 bad. I just want to be sure I have a complete list.
- 3 MR. CARVIN: If I might elaborate slightly,
- 4 Justice Breyer, I think it's important to understand
- 5 that they have the ability to inspect foreign auditing
- 6 forms, and the Cato Institute filed a brief that
- 7 described the adverse reaction of the 27 countries where
- 8 they are currently exercising this inspection power
- 9 abroad. It is totally beyond the control of the
- 10 President, obviously, as well as the SEC, to say how
- 11 these -- how these inspections and investigations are
- 12 going.
- JUSTICE SOTOMAYOR: They can't pass rules?
- MR. CARVIN: Again, they can pass rules, but
- 15 the Attorney General --
- 16 JUSTICE SOTOMAYOR: What is the difference
- 17 between what you are talking about and an employer who
- 18 says, look, I can't stick my nose in every bit of
- 19 business that goes on in my office because that's
- 20 impossible; otherwise I would be doing all the work and
- 21 I just humanly can't. I'm delegating to you the
- 22 responsibility to do X, Y, and Z according to these
- 23 rules of conduct.
- 24 MR. CARVIN: There are three fundamental
- 25 differences.

between that and this scheme?					
MR. CARVIN: In your hypothetical the					
principal has exactly the same powers as the					
subordinate. Here the subordinate has statutory duties					
and responsibilities totally distinct from what the SEC					
can do. In addition to inspections they can					
JUSTICE SOTOMAYOR: Let's break down each					
part of your argument, please. You are suggesting that					
Congress doesn't have the power to determine that a					
particular principal or agent of the government doesn't					
have certain responsibilities?					
have certain responsibilities?  MR. CARVIN: No, obviously they do. And					
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MR. CARVIN: No, obviously they do. And what you were asking for I'm now trying to describe the relationship between the SEC and the board, and the one difference between the normal employer-employee relationship is that the board has statutory authority wholly distinct from the principal.  Number two, if that subordinate didn't do things the way the principal wanted in the employment situation, the principal could fire the subordinate.					

JUSTICE BREYER: And if you have a statute

25

- 1 that says each Department -- Commerce, Justice -- the
- 2 Attorney General of the United States or the secretary
- 3 shall appoint an inspector general who will in fact
- 4 inspect and find ethics violations and that office -- he
- 5 cannot be removed from that office without cause. In
- 6 your view that's all -- would be unconstitutional.
- 7 MR. CARVIN: No, no. In the Interior
- 8 Department, those are of course the President's alter
- 9 egos --
- 10 JUSTICE BREYER: Yeah; well, why? What's
- 11 the difference?
- MR. CARVIN: Well, two differences. One is
- 13 the Secretary of the Interior is the President's alter
- 14 ego. So therefore the President --
- JUSTICE BREYER: So you are saying that
- 16 the -- the chairman of the SEC does not under the
- 17 Constitution have the authority or the SEC does not have
- 18 the authority to appoint individuals who cannot be
- 19 removed without cause?
- 20 MR. CARVIN: Well, I think there is two
- 21 points.
- JUSTICE BREYER: There are -- or you might
- 23 be saying they do not have the authority to appoint
- 24 inferior officers of the United States. I don't know
- 25 why they wouldn't have that authority if the Secretary

- 1 of the Interior has that authority.
- 2 MR. CARVIN: Well, because Freytag made it
- 3 clear that there is a difference between an independent
- 4 agency --
- 5 JUSTICE BREYER: What's an independent
- 6 agency?
- 7 MR. CARVIN: Well, in that case was an
- 8 independent agency in the Executive Branch.
- JUSTICE BREYER: Well, what is an
- 10 independent agency?
- 11 MR. CARVIN: One that is not subject to the
- 12 President's plenary control.
- JUSTICE BREYER: Why isn't it -- why aren't
- 14 they subject to the President's plenary control.
- 15 MR. CARVIN: Because of Humphrey's Executor
- 16 and because of the removal provisions, which pose very
- 17 serious removal restrictions on the President's ability
- 18 to control the SEC.
- 19 JUSTICE SOTOMAYOR: But you just --
- JUSTICE BREYER: The SEC. What
- 21 restrictions, because, interestingly enough, my law
- 22 clerks have been unable to find any statutory provision
- 23 that says that the President of the United States can
- 24 remove an SEC commissioner only for cause.
- 25 MR. CARVIN: It is silent. But it still --

- 1 JUSTICE BREYER: It's silent. Then in other
- 2 words --
- JUSTICE SCALIA: I don't think the
- 4 government will think it has achieved a great victory if
- 5 it comes out of this with the proposition that the SEC
- 6 is not an independent regulatory agency. And I don't
- 7 think the government is arguing that position.
- 8 MR. CARVIN: They have not taken that
- 9 position.
- 10 JUSTICE BREYER: But that was not what I
- 11 have asked.
- MR. CARVIN: I know. They haven't taken --
- 13 JUSTICE BREYER: I'm not interested in that.
- 14 I'm interested in an answer to my question.
- MR. CARVIN: Yes.
- 16 JUSTICE BREYER: And the answer to my
- 17 question was --
- MR. CARVIN: There is --
- 19 JUSTICE BREYER: -- is there anything in the
- 20 law as far as you know, any statute, that says that the
- 21 President cannot remove a commissioner or the chairman
- of the SEC but for cause?
- MR. CARVIN: Yes.
- 24 JUSTICE BREYER: The answer is there is
- 25 something?

- 1 MR. CARVIN: Yes.
- 2 JUSTICE BREYER: Where is that? Would you
- 3 refer me to that citation because we couldn't find it.
- 4 MR. CARVIN: They are given 5-year year
- 5 terms, so obviously if you have a term of 5 years there
- 6 is no removal provision. Under this Court's precedent
- 7 in Wiener, if there is a term you need to look at the
- 8 function of the agency. There was no removal
- 9 restriction in Wiener.
- JUSTICE GINSBURG: I thought that both
- 11 sides --
- MR. CARVIN: The Court --
- JUSTICE GINSBURG: I thought that both sides
- 14 agreed that there is no statute, everybody agrees to
- 15 that. But I thought that the government, just as your
- 16 side, agreed that the President could dismiss an SEC
- 17 commissioner for cause.
- MR. CARVIN: Yes, with -- pursuant -- for
- 19 cause.
- JUSTICE GINSBURG: Even though there's no
- 21 statute that says anything either way.
- MR. CARVIN: And the reason --
- JUSTICE GINSBURG: For cause would be short
- of the 5-year term.
- 25 MR. CARVIN: The reason we infer "for cause"

- 1 is because it was modelled after the FTC, and under
- 2 Wiener you need to look at function of the agency to
- 3 determine the President's removal authority.
- 4 JUSTICE SCALIA: "For cause" doesn't mean
- 5 for failure to obey the President's instructions, does
- 6 it?
- 7 MR. CARVIN: Not under Humphrey's Executor,
- 8 which made it clear that the President had no --
- 9 JUSTICE SCALIA: That's why it's called an
- 10 independent regulatory agency, because it's not subject
- 11 to presidential control.
- MR. CARVIN: Right.
- JUSTICE BREYER: I don't any agree with
- 14 that, but, I mean, you do agree. I thought an
- independent agency is a function of a number of
- 16 different thing: Where it is on the chart, what
- 17 people's customs have grown up to expectations about it
- 18 --
- 19 MR. CARVIN: And I will --
- 20 JUSTICE BREYER: -- what the President might
- 21 expect he can do or not. But all those things are not
- 22 what I'd call hard law.
- MR. CARVIN: It may not be hard law, but --
- 24 JUSTICE BREYER: Well but if it's not hard
- law, then I wonder. I mean, that's why I asked the

- 1 question. It's not what I have the answer to.
- 2 MR. CARVIN: Well, if Your Honor wants to
- 3 infer at-will removal of the SEC that would be
- 4 effectively overruling Humphrey's Executor. And if you
- 5 want --
- 6 JUSTICE BREYER: Why? In Humphrey's
- 7 Executor there was no provision that said? There was a
- 8 provision, which we know, that says the President cannot
- 9 remove an FTC commissioner but for cause. Have I been
- 10 wrong on that all those years?
- 11 MR. CARVIN: No, you've been entirely right,
- 12 but Humphrey's Executor did not focus on the removal
- 13 provision. It said that that removal provision was
- 14 constitutional, and the reason it was constitutional was
- 15 because you could make executive actors separate from
- 16 the chief executive. The SEC, like the FCC, has always
- 17 been lumped in with the FTC in terms of that. If this
- 18 Court wants to say that -- that those people are subject
- 19 to the President's plenary --
- JUSTICE SCALIA: I would love to say that.
- 21 That would be wonderful.
- MR. CARVIN: I'm not going to stand in your
- 23 way, because that would obviously -- that would
- 24 obviously render the board unconstitutional. I think
- 25 the key point here --

Τ	JUSTICE BREYER: It would render the board
2	unconstitutional?
3	MR. CARVIN: Yes, because
4	JUSTICE BREYER: If an executive appointee
5	who is a superior officer of the United States appoints
6	an inferior officer, which inferior officer can be
7	removed only for cause I mean, my goodness there
8	are lots of shapes and sizes. I can't imagine what
9	would be unconstitutional about that. What?
10	MR. CARVIN: Well, Your Honor, if the
11	President called up the head of the SEC and said, I want
12	you to seek sanctions against the chairman of Exxon,
13	under the traditional understanding of Humphrey's
14	Executor the SEC commissioner would not be beholden to
15	follow the President's direction.
16	The same would be true if he called him up
17	and said, fire the chairman of the PCAOB. And if that
18	is so, then the President has no ability to remove
19	somebody exercising a very important executive function,
20	and unless we are going to rewrite what has been
21	generally understood as the independence of of
22	independent agencies, then there is a fundamental
23	difference between the President's ability to fire an
24	inferior officer at the Justice Department and fire an
25	inferior officer at the independent agency.

1	JUSTICE	SCALIA:	This	is	not	an	argument	vou

- 2 have made anyway. Can we go on to the arguments that
- 3 you have made?
- 4 MR. CARVIN: Yes.
- 5 JUSTICE SCALIA: Thank you.
- 6 MR. CARVIN: And in terms of that basic
- 7 argument, he cannot control, for example, the
- 8 appointment of the board members, which he could with
- 9 respect to officers over whom he exercises. He can't
- 10 tell the SEC whom to appoint to the board.
- 11 And in terms of the question that Justice
- 12 Scalia asked earlier, I don't think it's a statutory
- 13 principle that you --
- JUSTICE SOTOMAYOR: Is it unconstitutional
- 15 for the President not to be able to appoint an inferior
- 16 officer?
- 17 MR. CARVIN: Not an inferior officer. But
- 18 of course, these are principal officers.
- 19 JUSTICE SOTOMAYOR: Assuming we don't accept
- 20 your characterization of them?
- 21 MR. CARVIN: Then I have two other
- 22 arguments, Your Honor.
- One is: The SEC cannot be a department
- 24 under Freytag, because it is an independent agency
- 25 indistinguishable from the Tax Court. And -- and what

- 1 the Freytag majority opinion said was, if you are unlike
- 2 a cabinet department because you are not subject to
- 3 political oversight, then --
- 4 JUSTICE SCALIA: I hope your case doesn't
- 5 rest on Freytag.
- 6 MR. CARVIN: I want to take an opportunity
- 7 to focus on the real point of Freytag, which was made
- 8 very eloquently in the Freytag dissenting opinion, which
- 9 was --
- 10 (Laughter.)
- 11 CHIEF JUSTICE ROBERTS: And the brief.
- 12 (Laughter.)
- 13 MR. CARVIN: -- the Appointments Clause is
- 14 designed to achieve accountability, and even when you
- 15 are not talking about presidential advice and consent
- 16 positions, the way we achieve that accountability is by
- 17 vesting it, in the words of the dissenting opinion, in
- 18 the President's direct lieutenant. And that's very
- 19 important because it makes the President accountable for
- 20 those positions and it also makes them able to resist
- 21 congressional encroachment.
- 22 And this scheme, besides, embodies precisely
- 23 the evil that was condemned by every member of the Court
- in Freytag and in Edmond, which is it creates an
- 25 unaccountable system where a multi-member commission

- 1 beyond the President's political oversight and control
- 2 is making appointments. Not one elected representative
- 3 in the President or the Senate has any influence who --
- 4 over the people appointed to this board.
- 5 JUSTICE GINSBURG: Does that mean, Mr.
- 6 Carvin, that the SEC cannot appoint heads of -- heads of
- 7 its divisions? I assume that they would fit within the
- 8 characterization "inferior officers."
- 9 MR. CARVIN: That would be true.
- 10 JUSTICE GINSBURG: So -- but if the SEC
- 11 can't appoint --
- MR. CARVIN: No, they can't appoint inferior
- 13 officers. Now, the board with the --
- 14 JUSTICE GINSBURG: Yes, so what are the
- 15 heads of the various divisions of the SEC?
- 16 MR. CARVIN: The board and the SEC say they
- 17 are not inferior officers, because they do not under
- 18 Freytag have any specific statutory authorization. They
- 19 are not, in the words of the Appointments Clause,
- 20 "established by law." So if they are --
- 21 JUSTICE GINSBURG: Aren't there -- aren't
- there people within the independent regulatory
- 23 commission that have jobs comparable to people who are
- 24 in the departments --
- MR. CARVIN: Yes.

- 1 JUSTICE GINSBURG: -- that the head of the
- 2 department can appoint? So who can appoint such people
- 3 in the SEC, the FTC, the FCC, and so on?
- 4 MR. CARVIN: There are two differences. One
- 5 is, for those lower-level people within the executive
- 6 departments, they have specific statutory creation of
- 7 those offices, the Solicitor General on down. There is
- 8 no statute saying that anybody below the commission
- 9 level at the SEC has any job.
- 10 That's totally up to the discretion of the
- 11 commission. They can vest them with whatever authority
- 12 they want or not.
- JUSTICE KENNEDY: But -- but the question is
- 14 -- I assume it is the follow-up question that Justice
- 15 Ginsburg is interested in -- under your view of the
- 16 case, why is that lawful?
- MR. CARVIN: No, it would only be unlawful
- 18 if they were inferior officers. And if the board is
- 19 correct that they are not inferior officers, there would
- 20 be no constitutional problem at all with the SEC, for
- 21 example, appointing a general counsel.
- 22 JUSTICE SCALIA: I don't understand that.
- 23 It's okay for them to appoint principal officers, but
- 24 not inferior officers?
- 25 MR. CARVIN: No, no. Employees, Your Honor.

- 1 JUSTICE SCALIA: Oh. Oh, I see.
- 2 MR. CARVIN: And the argument for them being
- 3 employees that the board has advanced is that they're --
- 4 that they're --
- 5 JUSTICE SCALIA: I wish you had said that.
- 6 You really had me scared there.
- 7 MR. CARVIN: If I am scaring you, I'm not
- 8 doing my job.
- 9 JUSTICE SCALIA: You are saying they are not
- 10 inferior officers and also not principal officers, but
- 11 merely employees?
- MR. CARVIN: Merely employees.
- JUSTICE SCALIA: And who appoints -- who
- 14 appoints the inferior officers at the SEC?
- MR. CARVIN: Well, that's my other point.
- 16 The chairman does, and so if you accept their view of
- 17 who the head of the department is, which is the
- 18 commission --
- 19 JUSTICE SCALIA: All those appointments are
- 20 presumably invalid.
- 21 MR. CARVIN: -- all those appointments are
- 22 unconstitutional, so under their theory --
- JUSTICE SCALIA: That would be a shame.
- MR. CARVIN: -- since the chairman didn't
- 25 appoint any, the general counsel, the heads of any of

- 1 the departments, all of them are unconstitutional.
- 2 JUSTICE BREYER: Does the chairman serve as
- 3 a chairman for a fixed term?
- 4 MR. CARVIN: Not as chairman. He just --
- 5 JUSTICE BREYER: Okay. So, therefore, what
- 6 you said before would not apply to the chairman, that is
- 7 to say: The President can remove him at will; there is
- 8 no statute to the contrary; he does not serve for a
- 9 fixed term, so you cannot imply that. Since the
- 10 chairman cannot be -- can remove him at will --
- 11 MR. CARVIN: But this statute doesn't --
- 12 JUSTICE BREYER: -- you do not have what you
- 13 would call the gearing into play, this somewhat
- 14 mechanical jurisprudence, of what's an independent
- 15 agency.
- 16 MR. CARVIN: No, he can remove the chairman
- 17 at his pleasure, which -- but not a commissioner. And
- 18 that's our whole point. That's a very key point.
- 19 JUSTICE BREYER: So you are saying that the
- 20 chairman, not the commissioner, is the person who does
- 21 the appointing?
- MR. CARVIN: We argue that. They argue the
- 23 opposite. Under the statute --
- JUSTICE BREYER: Okay.
- 25 MR. CARVIN: -- the commissioner does the

- 1 appointing. And that's our key point. Because the
- 2 President exercises such extraordinary control over the
- 3 chairman and therefore is able to control the SEC staff,
- 4 Congress, in the statute, took away that traditional
- 5 enforcement mechanism.
- 6 All of the SEC staff you were referring to
- 7 earlier, Justice Ginsburg -- Justice Ginsburg, are the
- 8 chairman's alter egos. And since they are the
- 9 chairman's alter egos, they are completely
- 10 constitutional. And Congress, again, took away the
- 11 chairman's powers, which was a way of limiting the
- 12 President's ability to control the board.
- 13 And I think they -- but our basic
- 14 observation --
- 15 JUSTICE GINSBURG: So this whole thing would
- 16 be constitutional if instead of giving the appointing
- 17 power to the commission, they had given it to the
- 18 chairman?
- MR. CARVIN: No, because we believe they are
- 20 principal officers for three reasons under Edmond: They
- 21 run their own shop; the commission has no control over
- 22 the officers on the board, since it can only remove them
- 23 in these extraordinarily narrow situations; and as we
- 24 have discussed at length before, can only review part of
- 25 its work product, whereas the appeals court judges in

- 1 Edmond, all of their work product was subject to review.
- 2 And I think the removal provision is
- 3 particularly important here. The board can pursue
- 4 policies that the SEC absolutely abhors and thinks are
- 5 completely counterproductive, but under this
- 6 extraordinarily narrow removal provision --
- 7 JUSTICE GINSBURG: Isn't that a highly
- 8 unlikely scenario? I mean, this thing won't work unless
- 9 these two are working in harmony.
- 10 MR. CARVIN: Well, it would work perfectly
- 11 if the board was an independent, autonomous entity that
- 12 was not subject to the plenary control of the SEC, and
- 13 that's exactly how the Senate report described it.
- No, the New York Stock Exchange works
- 15 perfectly fine even though the SEC has oversight
- 16 responsibility over the New York Stock Exchange directly
- 17 analogous to the oversight responsibility it has over
- 18 the board. So, no, it would work perfectly fine if you
- 19 followed the congressional scheme, which was an agency
- 20 with its own autonomy and power.
- 21 And since it is an agency that has its own
- 22 revenue sources, its own statutory authority, it has to
- 23 be an agency composed of principal officers. Elsewise
- 24 very powerful agencies, including the CIA for example,
- 25 would be considered inferior officers simply because in

- 1 an organizational chain they report to some others.
- 2 And I would argue, to get back to my
- 3 original point, Justice Scalia, that that would
- 4 absolutely confound the accountability that the framers
- 5 insisted upon, that either the President and the Senate
- 6 or a direct lieutenant of the President make the kinds
- 7 of appointments of inferior officers and that the
- 8 important officers go through the advice and consent
- 9 process.
- 10 If there are no further questions, I would
- 11 like to reserve the remainder of my time.
- 12 CHIEF JUSTICE ROBERTS: Thank you,
- 13 Mr. Carvin.
- 14 General Kagan.
- 15 ORAL ARGUMENT OF GENERAL ELENA KAGAN
- 16 ON BEHALF OF THE RESPONDENT UNITED STATES
- 17 GENERAL KAGAN: Mr. Chief Justice, and may
- 18 it please the Court:
- 19 Resolution of this case follows from a
- 20 simple syllogism and it is this: The President has
- 21 constitutionally sufficient control over the SEC. The
- 22 SEC has comprehensive control over the Accounting Board,
- 23 therefore the President has constitutionally sufficient
- 24 control over the Accounting Board.
- Now, Mr. Carvin has suggested that there --

- 1 JUSTICE SCALIA: Excuse me. The President 2 has adequate control over the SEC only because he can dismiss the chairman of the SEC. But the activity here 3 4 is not governed by the chairman of the SEC. There is no 5 role whatever for the chairmanship. The -- the governance of this board is by the members of the SEC. 6 7 So that's quite different from saying -- you know, I --8 I think your syllogism breaks down at that point. 9 GENERAL KAGAN: Well, I -- I -- I think not, 10 Justice Scalia. Humphrey's Executor said 70 years ago 11 the President does have constitutionally sufficient control over the SEC generally, including the chair. 12 13 Now, the SEC has constitutionally -- has 14 comprehensive control over the accounting board. There 15 is nothing that the accounting --16 JUSTICE SCALIA: The chairman, which is --17 which is -- which is the, what should I say, the knife 18 that the President has into the SEC, has no role in the 19 control of this board. 20 GENERAL KAGAN: The -- the chair has the 21 same role that he has with respect to pretty much everything else that the SEC does. The SEC --22
- 23 CHIEF JUSTICE ROBERTS: No. I thought the
- 24 employees were appointed by the chairman, not by the
- 25 commission.

- 1 GENERAL KAGAN: Subject to the control --
- 2 subject to the approval of the commission.
- 3 CHIEF JUSTICE ROBERTS: So you think -- you
- 4 think a -- a veto power is the same as an original --
- 5 original power?
- 6 GENERAL KAGAN: Well, in fact, the
- 7 commission could do the exact same thing in this case.
- 8 The commission could delegate its control over the
- 9 Accounting Board to the chair, subject to the control of
- 10 the commission again.
- 11 So I think that there is no difference with
- 12 respect to the SEC's supervision of the board than there
- is with respect to the SEC's supervision of any of its
- 14 other functions or any --
- 15 CHIEF JUSTICE ROBERTS: Let's say --
- 16 GENERAL KAGAN: -- of its staff.
- 17 CHIEF JUSTICE ROBERTS: Let's say that
- 18 the -- let's say that the board issues -- demands
- 19 documents from a particular company. Can the SEC direct
- 20 them not to do that?
- 21 GENERAL KAGAN: The SEC has full control
- 22 over the investigative and inspection function of the
- 23 board. This was what Mr. Carvin -- was the one thing
- 24 that Mr. Carvin said the SEC lacked, but in fact it does
- 25 not, because the board's investigations and the board's

- 1 inspections are all done according to rule. And the SEC
- 2 in a number of ways can change those rules.
- 3 The SEC can reach out and abrogate any board
- 4 rules, including rules relating to inspections and
- 5 investigations. The SEC also has power to promulgate
- 6 its own rules.
- JUSTICE SCALIA: Excuse me, but, you know,
- 8 Congress -- Congress can change the statutory authority
- 9 of any agency just like that. Does that mean that
- 10 Congress is controlling the agency?
- 11 GENERAL KAGAN: Well, it's certainly part of
- 12 Congress's control mechanisms, and this, too is part of
- 13 the SEC's control mechanisms with relation to the
- 14 Accounting Board. The Accounting Board can take --
- 15 JUSTICE SCALIA: I'm not sure that -- that
- 16 the ability to take away responsibility for an agency --
- 17 from an agency, is the same as controlling what
- 18 authority that agency does exercise. It seems to me
- 19 they are two different things.
- 20 GENERAL KAGAN: And I think that the SEC has
- 21 both. It certainly has the authority to take away
- 22 responsibility from the Accounting Board. The recision
- 23 provision in 7217 makes that completely clear. But it
- 24 also has authority to set the ground rules by which the
- 25 Accounting Board does anything and everything. It can

- 1 say tomorrow -- it can promulgate a rule and say all
- 2 inspections have to be approved by us, all
- 3 investigations.
- 4 CHIEF JUSTICE ROBERTS: Will that be
- 5 consistent -- do you think that will be consistent with
- 6 the intent of Congress in establishing the PCAOB?
- 7 GENERAL KAGAN: I -- I do think it would be
- 8 consistent with the intent of Congress,
- 9 Mr. Chief Justice, because the intent of Congress was to
- 10 place the Accounting Board under the extremely close and
- 11 comprehensive supervision of the SEC. The references to
- 12 independence that one finds throughout the legislative
- 13 record here are almost all references to independence
- 14 from the accounting industry, not from the SEC.
- 15 Quite to the contrary, Congress made it
- 16 clear --
- 17 CHIEF JUSTICE ROBERTS: Why did -- just out
- 18 of -- I guess maybe it's not important, but why did
- 19 the -- why did Congress set up a separate board if it's
- 20 going to be entirely controlled by the SEC?
- 21 GENERAL KAGAN: I think it is important,
- 22 Mr. Chief Justice, and I think that there were a few
- 23 reasons. First, Congress wanted to make sure that this
- 24 board did not compete with the SEC's own resources.
- 25 Members of Congress thought that the SEC had been

- 1 resource-strapped and wanted to create something with
- 2 its own separate funding stream, which it was able to do
- 3 by declaring this a kind of quasi-governmental agency.
- 4 Second, it wanted to get the board outside
- of the normal civil service laws, because it wanted to
- 6 attract people that it thought it could not attract on
- 7 normal civil service salaries.
- 8 And third, I think history and tradition
- 9 have a great role in -- in the question that you are
- 10 answering, because what -- the history and tradition of
- 11 SEC regulation of the financial industry in general
- 12 is -- is -- in -- in some part through the SROs, the
- 13 self-regulatory organizations. So --
- 14 CHIEF JUSTICE ROBERTS: Before we get --
- 15 before you get too far into that, of those first two
- 16 things, is there any reason Congress couldn't have
- 17 achieved those same objectives by establishing the PCAOB
- 18 as a division within the SEC?
- 19 GENERAL KAGAN: Well, I -- I think so. I
- 20 think it would have been harder to establish a separate
- 21 funding stream to take the Accounting Board out of the
- 22 civil service when the rest of the SEC is subject to
- 23 normal congressional appropriations and is subject to
- 24 basic civil service laws regarding salary and so forth.
- 25 So, this was a way to -- to have both.

1 And it was also, I think --2 JUSTICE KENNEDY: But that's -- that's the 3 history and tradition of this board which isn't very 4 long. But the history and tradition of boards like this 5 is that their investigative powers are independent. Now, you say that there could be a rule, but that just 6 7 isn't the way it works. And if you refer us to history 8 and tradition for other purposes, we ought to look at the operational principles, operational assumptions of 9 this board. 10 GENERAL KAGAN: Well, I -- I -- I do think, 11 12 Justice Kennedy, that -- that the way this board has set 13 up the statutory scheme and structure makes it clear 14 that the SEC has comprehensive authority not just over the rulemaking, but over the investigative and 15 16 inspection activities of the board; that no -- no 17 sanction arising from an investigation can be issued 18 except if the board agrees; that no inspection report 19 can be issued, except if the -- excuse me -- except if 20 the SEC agrees. 21 And further, as I said before, that the SEC 22 can reach further back into the process and say, not 23 only do we have this kind of veto authority over any sanction that comes out of an investigation or over any 24 25 report that comes out of an inspection, but we can also

- 1 change the way those inspections and investigations are
- 2 conducted in the first place.
- 3 CHIEF JUSTICE ROBERTS: Does it have
- 4 consequences for public companies subject to the board
- 5 if it refuses to turn over documents requested by
- 6 this -- this board?
- 7 GENERAL KAGAN: Well, for -- for -- for
- 8 public companies FOR -- not for the accounting firms in
- 9 general, but for their public company clients, any
- 10 subpoena would have to come, as Justice Ginsburg rightly
- 11 said --
- 12 CHIEF JUSTICE ROBERTS: I know, but
- 13 presumably you only get a subpoena when people don't
- 14 cooperate.
- 15 GENERAL KAGAN: That -- that's correct.
- 16 And -- and certainly public companies could cooperate
- 17 and certainly public companies have cooperated with the
- 18 board.
- 19 CHIEF JUSTICE ROBERTS: And what happens if
- 20 they don't?
- 21 GENERAL KAGAN: I -- I think that the board
- 22 would go to the -- to the SEC for a subpoena, ask the
- 23 SEC for a subpoena, and the SEC would choose whether to
- 24 grant that subpoena and whether to allow the kind of
- 25 investigation that the board wants.

- 1 CHIEF JUSTICE ROBERTS: Are there any
- 2 other -- are there any consequences from the company's
- 3 refusal short of -- that would not require the board to
- 4 get a subpoena?
- 5 GENERAL KAGAN: Are there any other
- 6 consequences for the public company?
- 7 CHIEF JUSTICE ROBERTS: In the absence of
- 8 the subpoena, nothing happens?
- 9 GENERAL KAGAN: I -- I -- I believe that
- 10 that is the case. I believe that it's the choice of the
- 11 public company whether to comply or not. If the public
- 12 company chooses not to comply, the board has to go to
- 13 the SEC and to get a subpoena.
- 14 CHIEF JUSTICE ROBERTS: Does it -- does it
- 15 have a consequence as a practical matter for the company
- 16 if it doesn't comply with a request from this board?
- 17 GENERAL KAGAN: Well, the board does not
- 18 regulate the public companies themselves. The board
- 19 only regulates the accounting firms.
- Now, the accounting firms do, as a condition
- 21 of their registration, have to present any documents
- 22 that the -- the -- the board wants. And so the
- 23 accounting companies have a real reason to comply with
- 24 the board's requests.
- 25 CHIEF JUSTICE ROBERTS: So there are in fact

- 1 collateral consequences that take place without any
- 2 involvement by the SEC?
- 3 GENERAL KAGAN: Well, I -- I -- I think
- 4 again the SEC could change any of the rules that govern
- 5 inspections, any of the rules that govern
- 6 investigations.
- 7 CHIEF JUSTICE ROBERTS: So if you had a
- 8 statute here that said, look, if you don't comply with
- 9 the board's request for documents, your authorities will
- 10 be suspended, and if that were the statute, you would
- 11 say, well, that's okay, because the SEC can always
- 12 change that rule.
- 13 GENERAL KAGAN: I think that -- that the
- 14 relationship between the SEC and the board has to be
- 15 looked at as a whole. And it's clear that the SEC has
- 16 control over everything that the board does or could
- 17 have control over everything the board does.
- 18 JUSTICE GINSBURG: General Kagan, I thought
- 19 that the Chief asked a question, he posed a sanction,
- 20 and I thought that any sanction the board wants to
- 21 impose has to be approved by the SEC?
- 22 GENERAL KAGAN: Well, that's exactly right.
- 23 Any sanction, any final inspection --
- 24 CHIEF JUSTICE ROBERTS: I'm sorry, I asked
- 25 you whether there were any consequences from the failure

- 1 of the company to turn over documents; and is your
- 2 answer that there are no consequences whatever?
- 3 GENERAL KAGAN: There are no consequences
- 4 with respect to the failure of public companies -- not
- 5 the accounting firms, but public companies -- to turn
- 6 over documents absent a subpoena, which the SEC needs to
- 7 issue.
- 8 JUSTICE ALITO: As a practical matter, does
- 9 the President have any ability to control what the board
- 10 does?
- 11 GENERAL KAGAN: I think, Justice Alito, the
- 12 President has the exact same ability that the President
- has with respect to every other aspect of the SEC's
- 14 operations. So --
- 15 JUSTICE SCALIA: No, but that's not true.
- 16 He can remove -- he can remove the chairman of the SEC.
- 17 GENERAL KAGAN: And --
- 18 JUSTICE SCALIA: And he cannot -- he cannot
- 19 remove the commissioners. And it's the commissioners
- 20 that govern the board, not the chairman.
- 21 GENERAL KAGAN: Well, it's the commissioners
- 22 that govern all aspects of the SEC's operations. The
- 23 chair only does what is delegated to him by the
- 24 commission or -- either -- or through the reorganization
- 25 plan.

- 1 JUSTICE ALITO: Well, let me give you an
- 2 example. Suppose the President objects to the -- the
- 3 very large salaries that the members of the board
- 4 receive. What are their salaries?
- 5 GENERAL KAGAN: Excuse me. They are over
- 6 \$500,000.
- 7 JUSTICE ALITO: And they -- did they decide
- 8 that themselves?
- 9 GENERAL KAGAN: Subject to the review of the
- 10 commission. And the commission has been active in this
- 11 area.
- 12 JUSTICE ALITO: Suppose the President reads
- 13 about this and he says: This is outrageous; I want to
- 14 change it. How can he do that? Remove --
- 15 GENERAL KAGAN: Well, I think he does --
- 16 JUSTICE ALITO: -- remove that -- remove the
- 17 SEC commissioners unless they take action against the
- 18 board?
- 19 GENERAL KAGAN: I think he does everything
- 20 that he would do with respect to any other SEC function,
- 21 is that he or some member of his staff would call the
- 22 chair or would call other commissioners and say: I have
- 23 a problem with this.
- JUSTICE SCALIA: Would you please change it,
- 25 right?

1 GENERAL KAGAN: Would you please change 2 it -- and -- and --3 (Laughter. ) 4 GENERAL KAGAN: -- and with respect to that, 5 that's exactly what --6 JUSTICE SCALIA: I could do that. 7 (Laughter. ) GENERAL KAGAN: Justice Scalia, that's 8 Humphrey's Executor. Humphrey's Executor does indeed 9 10 say that the President can't order the SEC commissioners 11 in the same way that he might be able to --12 CHIEF JUSTICE ROBERTS: Yes, yes. 13 GENERAL KAGAN: But that's a 70-year-old 14 precedent. 15 CHIEF JUSTICE ROBERTS: Right. That's 16 Humphrey's Executor. But you have to add to Humphrey's 17 Executor Perkins and Morrison. Humphrey's Executor says 18 you can limit the President's removal power. That 19 doesn't get you down to the board. You have to also say 20 the principal officers, there can be limits on their 21 removal authority of the board members. 22 GENERAL KAGAN: I -- I understand the 23 temptation to say something like, well, we don't really 24 much like Humphrey's Executor, but we are stuck with it, 25 but not an inch further.

1 CHIEF JUSTICE ROBERTS: I didn't say 2 anything bad about Humphrey's Executor. 3 (Laughter.) 4 GENERAL KAGAN: But -- but --5 JUSTICE SCALIA: I did, I did. (Laughter.) 6 7 GENERAL KAGAN: But this in fact --JUSTICE SCALIA: We did overrule it, by the 8 way, in -- in Morrison, didn't we? 9 GENERAL KAGAN: But two points. This in 10 fact does not go an inch further and it doesn't go an 11 inch further because of the SEC's comprehensive control 12 13 over the board, which makes the board function --14 CHIEF JUSTICE ROBERTS: I'm sorry. What is 15 the removal authority of the SEC with respect to board officers? 16 17 GENERAL KAGAN: The removal authority of the 18 SEC with respect to four -- with respect to board 19 officers is a for-cause removal. 20 CHIEF JUSTICE ROBERTS: All right. So there 21 is a limitation there. For cause does not include failure to follow the policies of the President. 22 23 GENERAL KAGAN: Let's assume that that's 24 correct. 25 CHIEF JUSTICE ROBERTS: So you need to rely

- on Morrison to make the limitations on what the SEC can
- 2 do with respect to the board constitutional.
- 3 GENERAL KAGAN: I think --
- 4 CHIEF JUSTICE ROBERTS: And you need to rely
- 5 on Humphrey's Executor to make the limitations on what
- 6 the President can tell the SEC constitutional.
- 7 GENERAL KAGAN: Mr. Chief Justice, removal
- 8 is just a tool. Removal is not the ultimate
- 9 constitutional question. The ultimate constitutional
- 10 question is the level of presidential control, and the
- 11 presidential control here is exactly the same with
- 12 respect to the board's activities as it is with respect
- 13 to the SEC staff's activities.
- 14 CHIEF JUSTICE ROBERTS: Oh, no, no, because
- 15 you have got an extra layer there. Let's say, I mean,
- 16 that you have to have two violations of the for-cause
- 17 provision. You have got to have -- you have to meet the
- 18 requirement in two places. When the SEC wants to remove
- 19 the board member, they can only do that for cause. And
- 20 if they decide, well, there isn't cause; I'm not going
- 21 to do it, then the President under your theory has to
- 22 remove the SEC commissioners, all of them, not just --
- 23 not just the chairman, and he can only do that for
- 24 cause.
- So you have got "for cause" squared, and

- 1 that's -- that's a significant limitation that
- 2 Humphrey's Executor didn't recognize and Morrison didn't
- 3 recognize.
- 4 GENERAL KAGAN: But that for-cause provision
- 5 is surrounded by a panoply of other control mechanisms.
- 6 CHIEF JUSTICE ROBERTS: Which one are we
- 7 talking about, the first one or the second one?
- 8 GENERAL KAGAN: The -- the for-cause
- 9 provision on the board members is surrounded by a
- 10 panoply of other control mechanisms which function as a
- 11 complete substitute, which give the SEC --
- 12 CHIEF JUSTICE ROBERTS: Well, let's just
- 13 talk -- a practical example. The board says I want to
- 14 get the documents of company X. The SEC thinks they
- 15 shouldn't do that. Okay? Can they remove them for that
- 16 situation -- in that situation?
- 17 GENERAL KAGAN: Well, they can pass a rule
- 18 that says no, you can't get the -- the documents of
- 19 company X, and then when the board members go ahead and
- 20 try to get the documents of company X --
- 21 CHIEF JUSTICE ROBERTS: Can they say --
- 22 GENERAL KAGAN: -- they can remove them.
- 23 CHIEF JUSTICE ROBERTS: -- you are fired?
- 24 Can they say, you are fired because we have control over
- 25 what you do and we don't think you should do that?

- 1 GENERAL KAGAN: I think that they
- 2 effectively can. They would have to do it by -- I think
- 3 that the easiest, quickest, most legally secure way
- 4 would be to -- to do it by -- by promulgating a rule
- 5 that says you can't do this. And then --
- 6 CHIEF JUSTICE ROBERTS: The easiest way to
- 7 do it is to pick up the phone, not by promulgating a
- 8 rule.
- 9 GENERAL KAGAN: I said the most legally
- 10 secure way to do it would be to do it that way. I think
- 11 that the fact that they have that formal mechanism means
- 12 that they could pick up the phone and accomplish the
- 13 exact same thing.
- 14 CHIEF JUSTICE ROBERTS: Can the President
- 15 pick up the phone and fire the SEC commissioners?
- 16 GENERAL KAGAN: The President can pick up
- 17 the phone and fire the SEC commissioners for cause,
- 18 however "cause" has been defined.
- 19 CHIEF JUSTICE ROBERTS: He thinks -- he
- 20 thinks they -- the board should be getting the documents
- 21 from the other company, and the SEC thinks they can't.
- 22 So the SEC tells the board, don't go after that company,
- 23 and because they do that the President fires the SEC.
- 24 Does that work under your theory?
- 25 GENERAL KAGAN: So now the SEC has given the

- 1 board one order and the President doesn't like the order
- 2 that the SEC has given to the board?
- 3 CHIEF JUSTICE ROBERTS: Right.
- 4 GENERAL KAGAN: Again, the President has the
- 5 same level of control over the SEC as he has with
- 6 respect to anything else. That's just Humphrey's
- 7 Executor.
- 8 CHIEF JUSTICE ROBERTS: I'm not worried if
- 9 it's the same. I'm worried if it's enough.
- 10 GENERAL KAGAN: Well, but that's Humphrey's
- 11 Executor. Humphrey's Executor said it was enough.
- 12 CHIEF JUSTICE ROBERTS: Right. And then --
- 13 GENERAL KAGAN: And the question is whether
- 14 this goes any further.
- 15 CHIEF JUSTICE ROBERTS: It goes further
- 16 because you have got to rely on the SEC to get to the
- 17 board. So there you have got to rely on Perkins and
- 18 Morrison.
- 19 GENERAL KAGAN: You always have to rely on
- 20 the SEC to do anything, to supervise anybody in its
- 21 field of operations, whether it's the SEC's own staff or
- 22 whether it's the board members who stand in essentially
- 23 the same relationship to the SEC commissioners as the
- 24 own SEC staff does.
- JUSTICE ALITO: Well, do you dispute the

- 1 proposition that the more layers of for-cause removal
- 2 you add, the -- the less control the President has?
- 3 Suppose there were five layers.
- 4 GENERAL KAGAN: Justice Alito, I think it
- 5 all depends. I mean, we are not saying that a double
- 6 for-cause provision is always constitutional, just as we
- 7 are not saying that a single for-cause provision is
- 8 always constitutional.
- 9 The question is, in what context does that
- 10 for-cause provision operate? And where it operates in a
- 11 context like this one, where it is surrounded by a
- 12 panoply of alternative and -- and equally effective
- 13 control mechanisms, it simply should not matter that
- 14 there's another for-cause provision.
- 15 JUSTICE BREYER: What do -- what do you say
- in response to their formal argument that heads of
- 17 departments are those people whom the President has
- 18 at-will control over, like the Secretary of Defense, and
- 19 Freytag is support for that. And these aren't those
- 20 people, so the SEC members must be inferior officers,
- 21 and the Constitution says nothing about and implicitly
- 22 forbids inferior officers from appointing other inferior
- 23 officers beneath them.
- All right, that's a formal argument, but I
- 25 got that out of their briefs, and I want to know what

- 1 you respond to it.
- 2 GENERAL KAGAN: Well, Justice Scalia, who
- 3 doesn't much like Humphrey's Executor, nevertheless
- 4 wrote a brilliant opinion in Freytag saying that in fact
- 5 independent agencies were departments, and -- and -- and
- 6 so that commissioners of the SEC would be principal
- 7 officers, their appointees would be inferior officers,
- 8 if -- if those appointees were subject to the direction
- 9 and supervision of the principals in exactly the way
- 10 Justice Scalia said was necessary in the Edmond case.
- 11 He -- he is --
- 12 JUSTICE SCALIA: Yes --
- 13 JUSTICE BREYER: So we have to take the
- 14 dissent there as opposed to taking the majority?
- 15 GENERAL KAGAN: No, no, no. Freytag --
- 16 Freytag reserves the question --
- 17 JUSTICE BREYER: I see.
- 18 GENERAL KAGAN: -- whether the independent
- 19 agencies were departments for purposes of the
- 20 Appointments Clause, and indeed in reserving that
- 21 question suggested that they thought that the
- 22 independent agencies, so-called, were a very different
- 23 kind of creature than the small, specialized units such
- 24 as the Tax Court. So I think --
- 25 JUSTICE KENNEDY: I want to ask -- I want to

1 ask one thing: You want us to imply or find -- or you 2 want us to infer from the statute that there's a power 3 in the President to remove SEC commissioners for cause? 4 You want us to find that that is implied in the statute? 5 GENERAL KAGAN: Justice Kennedy, the conventional understanding, really, ever -- ever since 6 7 Humphrey's Executor, is that SEC commissioners are 8 subject to a for-cause removal provision. And the --9 JUSTICE KENNEDY: All right. What is --10 what is the authority for us to find that there is an 11 implication in the statute to remove just for cause? 12 There is -- wouldn't that be unique in our precedents? 13 GENERAL KAGAN: I think that, if I 14 understand the question correctly, I think that the --15 the implication about --16 JUSTICE KENNEDY: I mean, if there is a 17 removal power implied, why isn't it removal for all 18 purposes -- why can it be limited to just for cause? 19 What authority do we have to do that? GENERAL KAGAN: Well, I think that the 20 21 understanding about the SEC commissioners is that the 22 SEC commissioners were, essentially, the same as the FTC 23 commissioners, which, under -- which, under Humphrey's, were removable only for cause, and as I believe --24 25 JUSTICE SOTOMAYOR: But that's because the

- 1 statute required it.
- 2 GENERAL KAGAN: Yes, but -- you are exactly
- 3 right, and it's a -- it's a perplexity of this law, but
- 4 for many, many decades, everybody has assumed that the
- 5 SEC commissioners are subject to the same for-cause
- 6 removal provision, and the government has not contested
- 7 that in this case, nor has Mr. Carvin.
- 8 JUSTICE SCALIA: General Kagan, the
- 9 government argues here that the head of a department is
- 10 all of the commissioners. Elsewhere, it is the chairman
- 11 of the SEC who -- who appoints inferior officers. Now,
- 12 which is it? Are all those appointments by the chairman
- 13 invalid?
- GENERAL KAGAN: No, they're not, because all
- 15 those appointments are made subject to the approval of
- 16 the commission.
- JUSTICE SCALIA: Well, that's something
- 18 quite different. He makes the appointments. They can
- 19 overturn it, but the appointment must be made by the
- 20 head of the department, and the appointments are not
- 21 made by the commissioners. They are made by the
- 22 chairman.
- 23 GENERAL KAGAN: Well, I think practice in
- 24 this regard has changed in different administrations,
- 25 but if you look at the amicus brief that was filed by

1	t.he	former	chairmen	of	t.he	SEC.	t.hev	make	clear	t.hat.	in

- 2 fact the commission has ultimate authority over each and
- 3 every appointment.
- 4 CHIEF JUSTICE ROBERTS: What do they have to
- 5 say about the theory that the SEC commissioners can be
- 6 removed by the President?
- 7 GENERAL KAGAN: I believe,
- 8 Mr. Chief Justice, that nobody has contested that
- 9 question.
- 10 CHIEF JUSTICE ROBERTS: And you are not
- 11 contesting it?
- 12 GENERAL KAGAN: And we are not contesting
- 13 the question that the SEC commissioners, themselves, are
- 14 removed by the President for cause under, I would say, a
- 15 very broad for-cause provision, in the way that Bowsher
- 16 suggested, not something that is niggling and technical.
- 17 CHIEF JUSTICE ROBERTS: Thank you, General.
- 18 GENERAL KAGAN: Thank you,
- 19 Mr. Chief Justice.
- 20 CHIEF JUSTICE ROBERTS: Mr. Lamken.
- ORAL ARGUMENT OF JEFFREY A. LAMKEN
- ON BEHALF OF THE RESPONDENTS PUBLIC
- 23 COMPANY ACCOUNTING OVERSIGHT BOARD, ET AL.
- MR. LAMKEN: Thank you, Mr. Chief Justice,
- 25 and may it please the Court:

- 1 The SEC has pervasive authority over every
- 2 aspect of the board's operations. Board rules and
- 3 sanctions have no effect, except as the SEC allows, and
- 4 can be changed by the SEC at any time.
- 5 Board inspections and investigations are
- 6 subject to plenary SEC control. Not only are they
- 7 conducted under rules that the SEC must approve, but the
- 8 SEC can threaten or actually rescind the board's
- 9 enforcement authority any time it thinks that's
- 10 appropriate in the public interest.
- It controls the board's budget and salaries,
- 12 and it can reassign matters to --
- 13 CHIEF JUSTICE ROBERTS: I thought -- so you
- 14 disagree with General Kagan? I thought she said one of
- 15 the reasons for taking the board outside the SEC is that
- 16 they have an independent funding stream.
- 17 MR. LAMKEN: Independent of the
- 18 congressional appropriations process, not independent of
- 19 the SEC. Section 7219 is clear as water that the SEC
- 20 controls the board budget, and the SEC in fact has used
- 21 that control to regulate down to the level of the board
- 22 members' salaries.
- In addition, the SEC can impose rules
- 24 requiring getting -- requiring the board, for example,
- 25 to get SEC pre-approval for particular steps or

- 1 particular actions.
- JUSTICE SCALIA: Do you know any other
- 3 agency composed of inferior officers that has the power
- 4 to acquire its own budget, as this board does, by simply
- 5 assessing a tax upon the people that it regulates?
- 6 MR. LAMKEN: In fact, this board doesn't
- 7 have that power, because it can only do so as the SEC
- 8 allows. Here, as in all other contexts, it's the will
- 9 of the SEC that controls.
- 10 JUSTICE SCALIA: The SEC can overturn it,
- 11 but it's up to the board -- the board can do it. Do you
- 12 know any parallel situation where there is a,
- 13 supposedly, agency composed of inferior officers who
- 14 have the power to tax the public unless it's overturned
- 15 by somebody else?
- 16 MR. LAMKEN: Well, there is a bunch of other
- 17 similar entities, such as the SIPC and the like, that
- 18 assess fees, and many of their officers are appointed by
- 19 department heads, rather than the -- than the President.
- 20 And so, yes, I think that's actually not an
- 21 uncommon feature, but the most -- but the most critical
- 22 aspect of this is, here, as in every other context, it
- 23 is the judgment and the decision of the SEC that
- 24 controls.
- The board can propose, but it's the SEC that

- 1 decides.
- 2 CHIEF JUSTICE ROBERTS: Well, the board can
- 3 act, and the SEC can, I suppose, retroactively veto
- 4 their actions, but the SEC doesn't propose what actions
- 5 the board takes, actions that can have significant,
- 6 devastating consequences for the regulated bodies.
- 7 MR. LAMKEN: Well, precisely the opposite.
- 8 With respect to rules, the board's rules are ineffective
- 9 --
- 10 CHIEF JUSTICE ROBERTS: I'm not talking
- 11 about rules. Agencies in the government do not act only
- 12 in implementing a particular rule. They have authority
- 13 to regulate.
- 14 And the board here, for example, can tell a
- 15 particular entity: You have to turn over these
- 16 documents. They don't have to have a rule that says,
- 17 this company must turn over the documents.
- 18 MR. LAMKEN: And the SEC staff can do
- 19 precisely the same thing. In fact, right now they can
- 20 issue subpoenas without asking the commission for
- 21 consent. And the -- and the answer is, if you don't
- 22 like it, you go to the principal officer, and you say,
- 23 rescind the board's authority -- threaten to rescind the
- 24 board's authority; this is out of line.
- 25 And the SEC has broad brought authority in

- 1 the public interest to rescind the -- the board's
- 2 authority to enforce the action, enforce the law in any
- 3 respect.
- 4 JUSTICE SCALIA: But you can say the same
- 5 thing -- you can say the same thing about Congress. I
- 6 mean, this is not the kind of control that an executive
- 7 officer normally is supposed to have over inferior
- 8 officers; when they do something, you can take away
- 9 their authority. Congress can do that.
- 10 MR. LAMKEN: Well, Congress would have to do
- 11 that by legislation, subject to veto by the President,
- 12 and in fact this is precisely the type of control that
- 13 powerful executives regularly exercise. If they don't
- 14 like the way an inferior is doing something, they can
- 15 take away that authority, and they can take away their
- 16 salary as well, which is so close to being fired that I
- 17 can't see any light between them, frankly, Your Honor.
- 18 So the board -- the SEC controls whether --
- 19 what the scope of the board's authority is and its
- 20 salaries --
- 21 CHIEF JUSTICE ROBERTS: Is there any
- 22 other --
- MR. LAMKEN: -- and it can issue rules
- 24 requiring start, stop, or obey my commands. And --
- 25 CHIEF JUSTICE ROBERTS: Is there any other

- 1 situation in the vast federal bureaucracy, where you
- 2 have this two-level situation that we have here?
- 3 MR. LAMKEN: Oh --
- 4 CHIEF JUSTICE ROBERTS: In other words, the
- 5 President can't remove the SEC commissioners at will.
- 6 They can't remove the PCAOB commissioners at will. Or
- 7 even if you look at it from the for-cause perspective,
- 8 there has to be two layers of for-cause.
- 9 MR. LAMKEN: Mr. Chief Justice, of course,
- 10 we view rescinding an officer's authority and paycheck
- 11 as being exactly like rescinding the officer's position,
- 12 but if you are can look at formal removal authority,
- 13 that exists throughout the United States government.
- 14 There are 1,100 in the --
- 15 CHIEF JUSTICE ROBERTS: What -- well, give
- 16 me an example.
- 17 MR. LAMKEN: 1,100 administrative law
- 18 judges, right now, which are for-cause removed operating
- 19 in independent agencies with for-cause removal by the
- 20 President; that the Postal Service's IG office, with
- 21 1,100 employees and 90 offices nationwide, removable for
- 22 cause by an entity that is removable for cause.
- 23 We --
- 24 JUSTICE KENNEDY: But we are talking -- we
- 25 are talking about independent or quasi-independent

- 1 agencies, and I understand Solicitor General Kagan to
- 2 say that's it's quite all right with an independent
- 3 agency for the President to phone them on an ongoing
- 4 basis and say, do this, and do that.
- 5 Do you agree that that's what the President
- 6 ought to do with an independent agency?
- 7 MR. LAMKEN: Well, Your Honor, I would
- 8 think --
- 9 JUSTICE KENNEDY: Call them on a routine
- 10 basis, to supervise what they are doing?
- 11 MR. LAMKEN: If the -- if the response from
- 12 the agency falled out -- falled out -- fell outside the
- 13 range of reasonable policy responses the agency could
- 14 adopt, then that might amount to inefficiency, neglect,
- 15 or malfeasance. And the SEC works --
- JUSTICE KENNEDY: Well, they -- this
- 17 board has authority to -- to tax those people it
- 18 regulates, to issue subpoenas and so forth.
- 19 MR. LAMKEN: Right.
- JUSTICE KENNEDY: This isn't subject to the
- 21 operations of the President, if he has to go through an
- 22 independent agency. Are you encouraging the President,
- on an ongoing, daily basis, to instruct an independent
- 24 agency what he wants done?
- MR. LAMKEN: Your Honor, the President has

- 1 the same control over the SEC's provision over the board
- 2 that he has over everything else that falls within the
- 3 SEC's jurisdiction.
- 4 JUSTICE SCALIA: Which is nothing, which is
- 5 nothing. I -- when I was -- I advised the President,
- 6 you can't interfere with -- I think, if the President
- 7 called up the FCC and said, I want you to rule this way.
- 8 I want this kind of a rule from the FCC, I think there
- 9 would be an impeachment motion in Congress.
- 10 MR. LAMKEN: But that -- that --
- 11 JUSTICE SCALIA: Congress set up that agency
- 12 to be independent from the President. That was the
- 13 whole purpose of it, wasn't it?
- MR. LAMKEN: Which is what Humphrey's
- 15 Executor -- Humphrey's Executor held up -- held up --
- 16 upheld that. That is what Humphrey's Executor upheld,
- 17 but this adds nothing to Humphrey's Executor because the
- 18 SEC --
- 19 JUSTICE KENNEDY: No, no, Humphrey's --
- 20 Humphrey's Executor was not a specific issue. It was
- 21 just the general qualifications.
- 22 MR. LAMKEN: I'm sorry. I believe
- 23 Humphrey's Executor was that he couldn't remove the --
- 24 the officers, except for cause -- and for cause --
- 25 JUSTICE KENNEDY: I -- I understand that.

- 1 MR. LAMKEN: -- and understood the
- 2 inefficiency, neglect, or malfeasance in office.
- 3 But this does not depart at all from that
- 4 standard, because the President has the same control
- 5 over the SEC that he has over any other independent
- 6 agency and the SEC has pervasive control over the board,
- 7 and it simply makes no sense to say that Congress can
- 8 give the SEC or an independent agency regulatory
- 9 authority, but not the ability to issue --
- 10 CHIEF JUSTICE ROBERTS: The formulation --
- 11 the formulation -- excuse me.
- MR. LAMKEN: I'm sorry.
- 13 CHIEF JUSTICE ROBERTS: The formulation that
- 14 you use and your friend the Solicitor General have used
- 15 -- has used is that they have the same authority that
- 16 they have over every other independent agency, but I'm
- 17 -- it's very hard to find out exactly what that
- 18 authority is.
- 19 So what is your position about the authority
- 20 of the President? Is it more than for-cause or only
- 21 for-cause?
- MR. LAMKEN: Our position is the same as the
- 23 Solicitor General's, because I represent inferior
- 24 officers whose positions are controlled by the SEC or
- 25 principal officers, and their lawyer is the Solicitor

- 1 General.
- 2 CHIEF JUSTICE ROBERTS: What do you
- 3 understand that position to be?
- 4 MR. LAMKEN: The position I understand the
- 5 Solicitor General to have is that the traditional
- 6 understanding of the SEC is that it is an independent
- 7 agency. But --
- 8 CHIEF JUSTICE ROBERTS: So the President --
- 9 I guess I am following up on Justice Kennedy's question
- 10 -- the President cannot call them and say, "Take this
- 11 particular action in this particular case. "
- MR. LAMKEN: I don't think he would be able
- 13 to enforce that in -- by removal, except --
- JUSTICE SCALIA: But it's okay for him to
- 15 ask them? It's okay for him to suggest to an
- 16 independent regulatory agency that this is how he wants
- 17 something done? Do you know of any instance where that
- 18 has happened?
- MR. LAMKEN: The Treasury Department works
- 20 closely with the SEC and tells the SEC precisely what it
- 21 thinks the SEC should do on a regular basis, but the
- 22 difference is the SEC turns around and can tell the
- 23 board exactly what it wants the board to do and back it
- 24 up by taking away their salaries, threatening to rescind
- 25 the enforcement authority, announcing rules that say you

- 1 may start, stop, alter investigations upon our direction
- 2 or the direction of the chief accountant.
- 3 The control of the SEC over the board is
- 4 plenary. This Court --
- 5 JUSTICE SCALIA: But what does the Treasury
- 6 Department tell the SEC to do?
- 7 MR. LAMKEN: Well, it issues
- 8 recommendations, for example, on how it wants the SEC to
- 9 handle, for example, international aspects. One of the
- 10 issues brought up here was the SEC's handling of
- 11 international things, and that is something what the SEC
- 12 -- its international bureau --
- 13 JUSTICE SCALIA: It takes the initiative?
- 14 The SEC doesn't request that information?
- MR. LAMKEN: Pardon.
- 16 JUSTICE SCALIA: The SEC doesn't request
- 17 that information; the Treasury Department just butts in?
- 18 Is that it?
- 19 MR. LAMKEN: That's one -- this is one
- 20 Executive Branch, Your Honor, and they work closely
- 21 together and I can't tell you exactly how they work, but
- 22 --
- JUSTICE SCALIA: I understand, but -- I
- 24 understand, but it's one thing for the SEC to ask the
- 25 Treasury Department's view. It's another for the

- 1 Treasury Department to butt in. Does it butt in?
- 2 MR. LAMKEN: I -- I do believe that -- that
- 3 other agencies do butt in all the time. The question is
- 4 --
- 5 JUSTICE BREYER: But what is the reason --
- 6 but what is the reason for this, having read this
- 7 enlightening opinion of Justice Scalia in Freytag which
- 8 is enlightening to me if I've read it correctly? I
- 9 would say that the question -- there are two separate
- 10 questions.
- One question is: What is a department? And
- 12 this might well fit within that.
- 13 And the second question, which is separate
- 14 but mixed up in the cases, but not his, is: When is it
- 15 constitutional for Congress to limit the President in
- 16 his ability to dismiss a -- an officer of the United
- 17 States or -- inferior or superior, for cause?
- 18 And -- and what's -- if you can answer it,
- 19 what are the justifications here for imposing that
- 20 requirement?
- 21 MR. LAMKEN: I think the first half is,
- 22 What's a department? And the answer --
- JUSTICE BREYER: I'm not interested in that.
- 24 I'm interested in -- I'm developing --
- MR. LAMKEN: The justifications for the

- 1 limitations on the removal of the officers of the board?
- JUSTICE BREYER: That's right.
- 3 MR. LAMKEN: Right. And the answer to that
- 4 is that these are the standard limitations -- the
- 5 standard removal provisions that exist throughout the
- 6 financial area where the SEC has a subordinate entity
- 7 under its control, and Congress presumed that because
- 8 the SEC's -- the SEC's control was so pervasive, it
- 9 didn't need to go back and revisit those standard
- 10 removal provisions, because, precisely because, the SEC
- 11 has power to rescind the board's enforcement authority,
- 12 establish rules requiring it to obey commands,
- 13 disobedience of which would be grounds for removal, to
- 14 withdraw the salaries.
- 15 The control is so pervasive that these
- 16 removal provisions did not have to be reconsidered. And
- 17 from the board's perspective, they're just another means
- 18 of control, one that actually taints them, as Shurtleff
- 19 points out, with having committed misconduct.
- Thank you.
- 21 CHIEF JUSTICE ROBERTS: Thank you, Mr.
- 22 Lamken.
- Mr. Carvin, to keep the time even here, you
- 24 have eight minutes.
- 25 REBUTTAL ARGUMENT OF MICHAEL A. CARVIN

1	ON BEHALF OF THE PETITIONERS
2	MR. CARVIN: The first thing I would like to
3	address is the Solicitor General's syllogism that
4	because the President can control the SEC somehow he can
5	control those whom the SEC regulates.
6	Well, the New York Stock Exchange has
7	exactly the same relationship as the with the SEC as
8	does the board, and no one would argue, I don't think,
9	that he has any power the President, that is to
-0	direct and supervise the New York Stock Exchange. In
1	response to your question, Justice Alito, he couldn't
2	complain about the excessive salary of Mr. Grasso at the
_3	New York Stock Exchange.
4	I would also like to knock down this myth
.5	JUSTICE GINSBURG: But there is there is
<b>.</b> 6	it was working okay with the Stock Exchange. It
_7	wasn't working okay with the accountants.
8	And there is a problem. There is a problem
_9	that Congress had to solve. It wanted to tighten the
20	oversight of the auditing function. And they wanted to
21	have people who were not beholden to the profession, but
22	who were knowledgeable and could command high salaries
23	to be doing this job.
24	MR. CARVIN: No, that's entirely true,
5	Justice Ginsburg and the point is they could have

- 1 accomplished all that and made the board members
- 2 appointed and removable by the President, if -- if --
- JUSTICE GINSBURG: How about if they --
- 4 would it work if the board members were proposed by the
- 5 SEC, by the SEC commissioners, subject to the approval
- 6 of the President? Would that be --
- 7 MR. CARVIN: Well, no, because the word
- 8 "approval," as earlier colloquy suggested, would --
- 9 JUSTICE GINSBURG: But the nominee would be
- 10 by -- a nomination. The names would be presented.
- 11 MR. CARVIN: The President needs the
- 12 unfettered ability to appoint principal officers, not to
- 13 have some subordinate agency tell him who he can
- 14 appoint. That would be a severe restriction, far
- 15 greater, for example, than was at issue in Public
- 16 Citizen. And that's essentially my point. They can't
- 17 give you -- I'm sorry.
- 18 JUSTICE GINSBURG: You were -- I'm sorry,
- 19 then. I interrupted you, but I wanted you to give me
- 20 your full picture of how this could be done, how
- 21 Congress could accomplish its goal of having a strong,
- 22 effective oversight body?
- MR. CARVIN: In the same way they have
- 24 strong, respective oversight of the communications
- 25 industry and what the FTC does and the FCC. Just follow

- 1 the model for independent agencies that has been used
- 2 for over 100 years. You make them appointed by the
- 3 President, removable by the President, and the President
- 4 gets to designate the chairman. The --
- 5 JUSTICE GINSBURG: So it would be totally
- 6 separate. Then you would -- it would have to be a
- 7 totally separate independent regulatory agency. It
- 8 could not be put under the wing of the SEC.
- 9 MR. CARVIN: You could have exactly the same
- 10 relationship between the SEC and this agency, which I
- 11 think is not under the wing of the SEC now. The only
- 12 difference is, instead of having the commissioners
- 13 appoint them and remove them, you'd have the President
- 14 appoint them and remove them.
- 15 CHIEF JUSTICE ROBERTS: Well, I would --
- 16 Judge Cavanaugh has suggested there are two ways to cure
- 17 this problem: One, have the President appoint and
- 18 remove; and the other thing, make it truly subordinate
- 19 to the SEC. Now, I've heard the argument on the other
- 20 side, both from the government -- well, it's at issue
- 21 with the government -- the Solicitor General and the
- 22 board, that the agency, the board, is completely
- 23 subordinate to the SEC.
- 24 Well, if Congress -- Congress could fix this
- 25 problem by saying: The board is subordinate to the SEC.

- 1 MR. CARVIN: So why have they created any
- 2 independence if they really wanted them to be
- 3 subordinate? And I really want to deal with that.
- 4 This notion that they could pass rules to
- 5 govern the investigative activities of the board is a
- 6 myth. The attorney general in Morrison had the ability
- 7 to promulgate rules for prosecution, but he couldn't
- 8 tell Alexi Morrison how to proceed in that individual
- 9 case. He couldn't say: Anything she does with respect
- 10 to Mr. Olsen, I need to pre-approve.
- 11 Why? Because the independent counsel, under
- 12 that statute, had the prosecutorial authority. Under
- 13 this statute, the board has the prosecutorial authority,
- 14 and everyone knows you can't govern the kind of manifold
- 15 decisions that prosecutors need to make through some
- 16 kind of bulky notice and comment rulemaking. And that
- 17 is why it is utterly mythical to pretend that they have
- 18 this power.
- 19 Justice Scalia, we assume that people
- 20 exercise the powers they have, removal and the like. We
- 21 don't assume that they exercise powers that they don't
- 22 have simply because they can theoretically get it. What
- 23 if the statute said the SEC --
- JUSTICE SCALIA: Say that again? Okay. We
- 25 don't assume that they --

1 MR. CARVIN: That they have powers they 2 don't have simply because they can reach out and get it. So let's assume the statute here said the 3 4 SEC could transfer the board's powers to the Treasury 5 instead of the SEC. Would we assume, would we analyze this case as if the Treasury was conducting the board's 6 7 powers simply because the SEC had the theoretical 8 ability to transfer it? 9 This Court has emphasized countless times 10 that you analyze separation of powers cases with respect 11 to the practical consequences, as Mistretta said it; as 12 Plaut said it, with respect to bright lines and high 13 walls; and as Airport Authority said it, with great 14 skepticism of Congress's subtle encroachments. You don't create fictional realities which allow severe 15 16 usurpations of executive authority on the basis of 17 fictional --18 JUSTICE GINSBURG: We don't know -- we don't 19 know what's fictional and what is not here, because you 20 came in, and you don't have a particular case. MR. CARVIN: I do have --21 JUSTICE GINSBURG: You have another instance 22 23 where Congress set up a scheme, and without having a particular case of an individual who has been hurt, you 24 25 come in and say: We might sometime be hurt by this, so

- 1 we want the whole thing knocked down in the absence of
- 2 any concrete case.
- MR. CARVIN: Justice Ginsburg, we know
- 4 exactly what the SEC and the Solicitor General think
- 5 about the interrelationship of the Constitution and the
- 6 statute, because they have expressed it in briefs from
- 7 the district court on up.
- 8 I am saying that even if you bend over
- 9 backwards to give them this power under the statute,
- 10 what you can't do is pretend that they have exercised
- 11 this power under the statute. The first might be a
- 12 doctrine of statutory construction. The second is
- 13 deciding separation of powers cases on the basis of
- 14 fictional world that doesn't really exist.
- 15 And I would suggest that that would give
- 16 Congress an extraordinary blueprint for using the board
- 17 as a model for each and every executive department.
- 18 What would stop them tomorrow from transferring the
- 19 Transportation and Labor and Energy Departments to a
- 20 private corporation like the board, and creating some
- 21 bipartisan commission that is going to oversee this
- 22 board with these fictional hypothetical realities?
- 23 If this Court endorses this scheme, they
- 24 have literally offered no limiting principle why that
- 25 couldn't be applied to each and every executive

- 1 function. To the contrary, they have emphasized that
- 2 there is no constitutional distinction between alter
- 3 egos and these independent commissions, and they have
- 4 sought to justify this scheme on the basis of cases
- 5 involving poor executive functions, Perkins and
- 6 Morrison. So, again --
- 7 JUSTICE GINSBURG: If we took away -- I
- 8 mean, one big point was the double for-cause. So let's
- 9 say we have said that the SEC could fire board members,
- 10 period. Then that would remove the double for-cause.
- 11 Would this statute then be constitutional?
- MR. CARVIN: Well, I don't think you can
- 13 sever that provision from the statute, because I
- 14 don't -- I think you would be rewriting the statute and
- 15 restriking the balance that Congress did. Moreover, of
- 16 course, it wouldn't solve the acquaintance clause
- 17 problem because, again, these are principal officers not
- 18 appointed by the President, and even if they are
- 19 inferior officers, the SEC is not --
- JUSTICE GINSBURG: So, it is not the double
- 21 for -- the double for-cause isn't, in your judgment,
- 22 what sinks this statute?
- MR. CARVIN: Well, no. It is a very
- 24 serious -- yes, it is by my view absolutely dispositive
- 25 of why the statute is no good. I'm saying merely fixing

- 1 that will not fix the entire statute, because in
- 2 addition to removal problems, we have very serious
- 3 appointment problems under the appointments clause.
- 4 JUSTICE STEVENS: May I ask you one narrow
- 5 question? If we assume that the members of the board
- 6 are inferior officers, and if we -- do -- would you
- 7 agree that if the board had unrestricted power to
- 8 discharge them at will, the statute would be
- 9 constitutional?
- 10 MR. CARVIN: Your -- I'm -- I'm to assume
- 11 that the Appointments Clause problem -- if they are
- 12 inferior officers, again, I have an Appointments Clause
- 13 problem, because they are appointed by somebody who is
- 14 not a department head, i.e. the SEC commissioner.
- 15 Do you want me to take that out and assume
- 16 that that's okay as well?
- 17 JUSTICE STEVENS: Yes.
- 18 MR. CARVIN: Okay. So, if we are looking at
- 19 it strictly from a separation of powers perspective, it
- 20 is true that eliminating the for-cause removal provision
- 21 goes a long way towards fixing the problem, but it
- doesn't go all the way and for one reason, which is we
- 23 think the SEC imposes -- is at the outer most limits of
- 24 constitutional acceptability. And, so, unless the
- 25 President has the same control over the officers that he

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1	has over the SEC, it would not be good.
2	JUSTICE STEVENS: But your answer to my
3	question is that even if they were inferior officers and
4	the other conditions were met, if the Commission had
5	unrestricted power of removal, the statute would still
6	be unconstitutional.
7	MR. CARVIN: Principally because they are
8	not subject
9	JUSTICE STEVENS: The answer is yes is what
L O	I just
.1	MR. CARVIN: I'm sorry. Yes, Your Honor.
2	May I just
_3	JUSTICE STEVENS: Yes. Sure.
4	MR. CARVIN: They are not subject to the
_5	chairman's control, unlike the SEC general counsel, and
_6	they have statutory duties entirely distinct from the
_7	Commission unlike the SEC general counsel.
8_	CHIEF JUSTICE ROBERTS: Thank you, counsel.
_9	The case is submitted.
20	(Whereupon, at 11:13 a.m., the case in the
21	above-entitled matter was submitted.)
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